(2)

Supreme Court, U.S.
FILED
OCT 10 1997
CLERK

No. 97-413

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

Diamant Boart, Inc.,

Petitioner,

v.

Joyce Martin, Individually and as Personal Representative of the Estate of Harry O. Martin, Deceased,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

David A. Fedor
J. Marcus Whitlark
Paul C. Ballou
Fedor, Massey, Whitlark & Ballou
Post Office Box 7014
Columbia, SC 29202
(803) 799-9022

James B. Richardson, Jr.*
Svalina, Richardson & Larson
1338 Main Street, Suite 808
Columbia, SC 29201
(803) 799-9412

*Counsel of Record.

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

CONCLUSION 9

TABLE OF AUTHORITIES

Cases: Page:

Mock v. Atlantic Coast Line R.R.,
227 S.C. 245, 87 S.E.2d 830 (1955) 6

Beaudrot v. Southern Ry.,
69 S.C. 160, 48 S.E. 106 (1904) 6

Cartee v. Lesley, 290 S.C. 333, 350 S.E.2d 388 (1986) 8

Davenport v. Woodside Cotton Mills Co.,
225 S.C. 52, 80 S.E.2d 740 (1954) 6

Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 6

Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991) . . 4

Mattison v. Dallas Carrier Corp.,
947 F.2d 95 (4th Cir. 1991) 4

Ravan v. Greenville County,
315 S.C. 447, 434 S.E.2d 296 (Ct. App. 1993) 8

Rogers v. Florence Printing Co.
233 S.C. 567, 106 S.E.2d 258 (1958) 6

Sample v. Gulf Oil Refinery,
183 S.C. 399, 191 S.E. 209 (1937) 6

Tant v. Dan River, Inc.,
289 S.C. 325, 345 S.E.2d 495 (1986) 8

Wise v. Broadway, 315 S.C. 273, 433 S.E.2d 857 (1993) 7

Constitutional Provisions:

U.S. Constitution, amendment fourteen 5

U.S. Constitution, amendment seven 5, 6

Statutes:

South Carolina Pollution Control Act, S.C. Code Ann. §§ 48-1-90, *et seq.* (1987) 1, 2, 7, 8

Law Review Articles:

David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform,* 39 VILL. L. REV. 363 (1994) 6

David G. Owen, *Punitive Damages in Products Liability Litigation,* 39 MICH. L. REV. 1257 (1994) 6

STATEMENT OF THE CASE

Diamant Boart America, Inc. ("DBA") opened its plant in the Columbia, South Carolina suburbs in 1977. The plant was not connected to a sewer system. The early plans for the plant's design called for the construction of various filters and recycling systems to treat the plant's wastewater discharge, which would contain volatile organic compounds ("VOC's") and other hazardous waste. (The plant's industrial processes required the use of large quantities of "degreasers," solvents, and other chemicals. These included several VOC's well known to be hazardous to human health, including trichloroethylene (TCE), tetrachloroethylene (PCE), and dichloroethylene (DCE).) As built, however, the plant included no such treatment devices. Instead of disposing of its waste offsite, DBA simply dumped its effluent onto the ground in back of the plant and into the underground septic field on the property for fourteen years after the plant opened. These discharges ranged from 5,000 gallons, the volume contained in a holding tank at the back of the plant, to 55-gallon drums full of various chemicals brought by employees from locations all over the plant, all the way down to 5-gallon buckets poured out the back door. On an average day, DBA discharged about 12,000 gallons of contact wastewater and 13,000 gallons of non-contact cooling water directly to the ground. The total amount of contaminated wastewater discharged by DBA over the fourteen-year period exceeded 100,000,000 gallons. DBA had no permit to discharge any of these wastes prior to 1989. DBA's 14-year practice of dumping without a permit was in violation of South Carolina's Pollution Control Act, S.C. Code Ann. §§ 48-1-90, *et seq.* (1987).

DBA had one of its contact wastewater streams tested by an independent laboratory in 1982 and again in 1986. In 1982 the stream was found to contain hazardous waste concentrations above regulatory maximum levels. Both tests showed that DBA was dumping contaminated wastewater, even though DBA denied such knowledge at trial.

In 1987, after dumping wastewater illegally for ten years, DBA commissioned an environmental audit by an outside consultant, Norman Parker. In the course of his audit Mr. Parker observed blatant violations of the South Carolina Pollution Control Act. He witnessed discharges of hazardous wastes such as TCE directly to the wastewater stream and to the ground. Mr. Parker reported to DBA management that the plant had a history of spills of TCE, a source of potentially significant soil and groundwater contamination. He warned DBA management of the risks of groundwater contamination and the need to go to a "zero discharge" system. He advised DBA that a "zero discharge system" was technologically feasible. He warned that TCE and other solvents will quickly migrate with resultant groundwater contamination of the underlying aquifer. Mr. Parker observed that a major problem was what he perceived to be a lack of upper management support for the safe disposition of hazardous waste. Mr. Parker concluded his environmental audit by expressing his opinion that DBA's dumping of wastewater posed a serious risk of groundwater contamination which required correction in an urgent manner. DBA continued its illegal discharges until September 1989.

In 1983 DBA falsely represented to the South Carolina Department of Health and Environmental Control (DHEC) that DBA did not handle hazardous waste in any way in 1981 or 1982. DBA's senior management admitted at trial that hazardous waste, including waste degreasers, were continuously present on DBA's premises from 1977, and admitted that DBA had intentionally falsified the report to DHEC.

In 1982 DHEC wrote to DBA asking whether it was discharging any effluent. DBA did not reply. DHEC failed to follow up. In early 1986, DHEC repeated its question. Again DBA failed to respond, and again the agency failed to follow up. The same thing happened a third time in late 1986. DBA did not respond to DHEC inquiries until September 1989. DBA offered no explanation for its failure to respond to the agency's repeated inquiries. When DHEC finally investigated, DBA agreed to a

consent order forbidding it to dump any contact cooling water, and reducing the discharge of noncontact cooling water from about 13,000 gallons daily on average to a maximum of 500 gallons daily. The dumping of VOC's was prohibited altogether.

In 1990 the Martins, who lived about 360 feet from DBA's property, discovered that their well water was contaminated with TCE, PCE and other hazardous chemicals. The Martins had been drinking this water for years. Similar findings were made with thirty other drinking water wells in Royal Pines subdivision. DHEC advised the Martins and others to cease using their wells for drinking, bathing, or cooking. Six of these wells were within a quarter mile of DBA's plant, including the Martins' well and that of a child care facility.

"Mounding" is an accepted explanation in the hydrological community for subterranean migration. Plaintiff's hydrogeologist, Jack Parker, testified that mounding accounted for the migration of DBA's pollution to the Martins' property. He opined that mounding caused by these massive wastewater discharges resulted in a shift in the regional underground water flow and channeled DBA's hazardous wastes to the Martins' well and beyond. Dr. Parker ruled out all other possible sources of the Martin pollutants by applying hydrological principles to all relevant data, including DHEC's investigation. He testified that there was no doubt that DBA was the source of the contamination of the Martins' property and in Royal Pines generally.

DBA's hydrogeologist, Bryson Trexler, agreed that mounding can radically alter the direction of groundwater flow. Dr. Trexler conceded that it was probable that mounding caused DBA's polluted groundwater to reach the Martins' well as Dr. Parker believed, if Dr. Parker's underlying data concerning the rate of illegal wastewater discharge were correct. The data were unchallenged. PCE, DCE, and methylene chloride were all detected in DBA's groundwater and in the Martins' groundwater. TCE was detected in the Martins' groundwater and in samples of DBA's

groundwater. DBA's expert, Dr. Todd, acknowledged that TCE was present in DBA's groundwater. The fact that only low concentrations of these toxins are now present in DBA groundwater was explained by Dr. Trexler. These pollutants tend to migrate. The longer the time since discharge, the lower the concentration at the point of discharge. Dr. Trexler acknowledged that the bulk of these chemicals would have been flushed away from DBA property over time, leaving only the low concentrations on DBA property found by Dr. Trexler. Plaintiff's hydrologist Dr. Parker agreed. Present concentrations of PCE, TCE, and DCE in DBA's groundwater fit the profile expected by Dr. Parker and by Dr. Trexler.

There is no evidence to suggest that the pollution plume which contaminated the Martins' property and the other property in Royal Pines originated anywhere but at DBA. DBA is the source of the contaminant plume in Royal Pines subdivision and on the Martins' property.

At trial DBA denied ever purchasing barrels of TCE despite the testimony of the chemical company salesman and several plant employees. During Norman Parker's 1987 environmental audit of DBA, he also discovered TCE drums at the plant. DBA denied ever having open waste streams with solvents, oils, and metals in them. DBA denied that employees regularly dumped chemicals onto the ground, out the back door, or into the open waste streams.

* * * *

The petition for writ of certiorari contains several inaccurate statements. DBA states that "[t]he district court did not *** provide the jurors any instruction to assist them in determining the appropriate amount of [punitive] damages." (Petition at 5.) On the contrary, the district court charged the jury at length upon the standards governing the assessment of punitive damages, as prescribed in *Gamble v. Stevenson,* 305 S.C. 104, 406 S.E.2d 350 (1991), and in *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th

Cir. 1991) .

DBA states (Petition at 6): "On appeal, DBA argued that the district court's instructions *** violated DBA's rights under the Seventh Amendment and under the due process clause of the Fourteenth Amendment." No such issues were raised on appeal. Not until its petition for rehearing in the Court of Appeals did DBA first contend that it was denied due process by South Carolina's rule that punitive damages in *some* amount must accompany a finding that plaintiff's rights were willfully violated.

DBA states (Petition at 7) that the Court of Appeals "did not address the impact [of] this instruction [*i.e.*, that punitive damages in *some* amount must be assessed for a willful violation of plaintiff's rights] on DBA's right to a jury trial." This is literally correct, since DBA raised no such contention in the Court of Appeals.

REASONS FOR DENYING THE WRIT

A. Neither of the issues presented in the petition was raised in the District Court or the Court of Appeals.

The petition for certiorari is the first time that DBA has said anything about the Seventh Amendment. DBA states (Petition at 6) that "[o]n appeal, DBA argued that the district court's instructions, among other things, violated DBA's rights under the Seventh Amendment and under the Due Process Clause of the Fourteenth Amendment." This is simply untrue. DBA claims that "[t]he Court of Appeals failed to address the Seventh Amendment issue." There was no Seventh Amendment issue to address. The due process contention originated in DBA's petition for rehearing in the Court of Appeals. At no time before the petition for rehearing did DBA argue that South Carolina's rule requiring the jury to assess punitive damages in *some* amount violates the Due Process Clause.

The same is true of DBA's Question II. At no time has DBA argued that due process is denied by a jury instruction that violation of an applicable statute creating a standard of conduct is negligence *per se* and is evidence of willfulness.

B. The Seventh Amendment is not implicated where the District Court applies the substantive law of the forum state to determine whether punitive damages in *some* amount must be assessed against a wrongdoer.

South Carolina is among the minority of jurisdictions where a willful, wanton, and reckless violation of plaintiff's rights *requires* the award of punitive damages in *some* amount. *Sample v. Gulf Oil Refinery,* 183 S.C. 399, 191 S.E. 209 (1937). *See* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform,* 39 VILL. L. REV. 363, 388 n.92 (1994). The amount is for the jury to determine under a proper charge. Plaintiff's entitlement to punitive damages in *some* amount if a willful violation is shown reflects the dual function of punitive damages in South Carolina as not only punishment and deterrence but as a vindication of the plaintiff's private right. *See, e.g., Rogers v. Florence Printing Co.,* 233 S.C. 567, 106 S.E.2d 258, 261 (1958); *Beaudrot v. Southern Ry.,* 69 S.C. 160, 48 S.E. 106, 107 (1904), and cases cited; *Davenport v. Woodside Cotton Mills Co.,* 225 S.C. 52, 80 S.E.2d 740, 743-44 (1954). *Cf. Mock v. Atlantic Coast Line R.R.,* 227 S.C. 245, 267, 87 S.E.2d 830, 840 (1955). *See generally* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform,* 39 VILL. L. REV. 363, 378-79 (1994); David G. Owen, *Punitive Damages in Products Liability Litigation,* 39 MICH. L. REV. 1257, 1295 (1994).

Plaintiff's entitlement to punitive damages in *some* amount — even if nominal — upon proof of a willful violation of her rights could not be affected by the removal of this action to district court. *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938). The Seventh Amendment guarantees DBA the jury trial which it received on the issue of whether its violation of plaintiff's rights was willful,

wanton, and reckless, and on the appropriate amount of punitive damages assessable for the violation.

C. The settled principle that violation of a statute creating a rule of conduct is negligence *per se* and is evidence of willfulness does not implicate the Due Process Clause.

The district court charged Section 48-1-90 of South Carolina's Pollution Control Act. This statute does not prohibit "the discharge of any substance" as DBA says, but rather prohibits the discharge of industrial wastes, etc., "except as in compliance with a permit issued by [DHEC]."

DBA mischaracterizes the charge. Nowhere in the charge did the district court instruct the jury that "a violation of law is willful and deliberate conduct *** " as DBA claims. The court instructed the jury:

> Now, the violation of a statute does not in and of itself prove recklessness, willfulness, or wantonness in and of itself, but is evidence that the jury may consider in arriving at its conclusion whether the defendant acted recklessly, willfully, and wantonly. And once again, the evidence must establish that the defendant's act of recklessness, willfulness, wantonness proximately caused the plaintiff's injury or damage.

This is an accurate statement of South Carolina law, and is the law nearly everywhere. Causative violation of a statute is evidence of willfulness, but it is always for the jury to decide whether a party was willful, as the court explained to the jury. *See, e.g., Wise v. Broadway,* 315 S.C. 273, 433 S.E.2d 857 (1993), where the court stated:

> The causative violation of a statute constitutes negligence *per se* and is evidence of recklessness and

> willfulness, requiring the submission of the issue of punitive damages to the jury. [Citations omitted.] Violation of a statute does not constitute recklessness, willfulness, and wantonness *per se*, but is some evidence that the defendant acted recklessly, willfully, and wantonly. [Citation omitted.] It is always for the jury to determine whether a party has been reckless, willful, and wanton. [Citation omitted.] However, it is not obligatory as a matter of law for the jury to make such a finding in every case of a statutory violation. [Citation omitted.]

433 S.E.2d at 859. *Accord: Cartee v. Lesley*, 290 S.C. 333, 350 S.E.2d 388, 390 (1986); *Ravan v. Greenville County*, 315 S.C. 447, 434 S.E.2d 296, 303 (Ct. App. 1993); *Tant v. Dan River, Inc.*, 289 S.C. 325, 345 S.E.2d 495 (1986).

DBA's complaint seems to be that a violation of statute is not negligence *per se* and is evidence of willfulness absent other proof of a state of mind. The actor's state of mind plays no part in negligence law. The standard is the conduct of a reasonably prudent person. The nearly universal principle that violation of an applicable statute is negligence *per se* is rooted in the truism that ordinarily prudent people do not violate statutes which prescribe a standard of conduct. In South Carolina as in most States, violation of an applicable statutory standard of conduct is not only negligence *per se* but is evidence of willfulness. As the district court correctly instructed the jury, although statutory violations may be viewed as evidence of willfulness, it was for the jury upon all the evidence to determine whether DBA's conduct was willful.

Since DBA's 14-year history of intentional disregard of South Carolina's Pollution Control Act could not have been "innocent," there is no occasion here to determine whether the due process clause is implicated where a non-negligent, unintentional violation of a statutory standard of conduct accepted as evidence of willfulness.

CONCLUSION

The petition should be denied.

Respectfully submitted,

David A. Fedor
J. Marcus Whitlark
Paul C. Ballou
Fedor, Massey, Whitlark & Ballou
Post Office Box 7014
Columbia, SC 29202
(803) 799-9022

James B. Richardson, Jr.*
Svalina, Richardson & Larson
1338 Main Street, Suite 808
Columbia, SC 29201
(803) 799-9412

*Counsel of Record.

Counsel for Respondent

October 9, 1997.